Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SANG KYU HAN AND SEONG SOON HAN,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 1, 2010

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QUESTIONS PRESENTED

Petitioners, Sang Kyu Han and Seong Soon Han ask that this Court issue a writ of certiorari to make the following determinations:

1. To determine if the Ninth Circuit Court of Appeals has the authority to make a determination on a defense of equitable estoppel where: a) such a defense was not provided the opportunity to be fully litigated in the lower courts; and b) where Petitioners were not given the opportunity to present a complete record for this defense; and

2. To resolve the inconsistent treatment of a defense of equitable estoppels by the United States Court of Appeals in cases involving the United States Government.

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Han v. Holder*, Docket No. 06-72473, is attached to this petition as Appendix A at 1a. The agency opinion issued by the Board of Immigration Appeals, In re: Sang Kyu Han and Seoong Soon Han, File Nos. A70-971-660 and A70-971-660 (BIA May 4, 2006), is attached hereto as Appendix B at 4a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment denying the timely submitted petition for review on July 31, 2009. *See* Appendix A at 1a.The mandate was subsequently issued by the Ninth Circuit on December 3, 2009. The order denying review of the agency appeal is attached hereto as Appendix A at 1a. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decision below served to deprive Mr. and Mrs. Han of their rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person . . . shall be deprived of life, liberty, or property, without due process of law."

I. STATEMENT OF THE CASE

Mr. Han and Mrs. Han, both Korean immigrants, entered the United States in the 1980s. Their Notice to Appear dated April 2, 2003 charged both with removal pursuant to INA §§237(a)(1)(A) and 212(a)(7)(A)(i)(I). (R:527-529, 546-548). On June 24, 2005 the Immigration Judge ordered removal of Petitioners. *See* Appendix C at 8a. On June 27, 2005, Petitioners, through their counsel, moved the Board of Immigration Appeals ("BIA") to reconsider the Immigration Judge's decision removing Petitioners. The motion to reconsider was made on the grounds that the government should have been estopped from charging respondents with removability pursuant to INA §§237(a)(7)(A)(i)(I) and 237(a)(1)(A) based on government's unclean hands for its involvement in fraud. On May 4, 2006 the BIA issued an order affirming the Immigration Judge's decision in this matter. *See* Appendix B at 4a.

II. SUMMARY OF ARGUMENT

Mr. and Mrs. Han hereby assert that the Immigration Judge, in contravention with precedent of the Supreme Court of the United States, determined that no authority existed to make a determination on a defense of estoppel. This erroneous finding by the Immigration Judge resulted in a defective record that failed to contain the necessary evidence and facts to support Mr. and Mrs. Han's estoppel defense. This record failed to provide both the Board of Immigration of Appeals and the Court of Appeals for the Ninth Circuit with a record for proper review of the defense of estoppel.

Mr. and Mrs. Han further assert that the Court of Appeals for the Ninth Circuit not only based its analysis of a defense of estoppel on a deficient record, but also applied an analysis inconsistent with the authority set out by the Supreme Court of the United States. The practical result of this decision will be to eliminate the ability to apply a defense of estoppel against the United States Government in an immigration matter.

III. ARGUMENT IN SUPPORT OF PETITION

A. ESTOPPEL DUE TO VIOLATIONS OF DUE PROCESS.

The court found in the *Matter of Thornburgh*, 869 F.2d 1503, 1512 (D.C. Cir. 1989) that the government may be estopped from deportation for violations of due process protections of applicants. The failure to comply with the due process rights of Appellants for deportation should result in the estoppel of claims of deportation. Implications of wrongdoing through violations of due process cannot lead to deportation. The DHS should be estopped from deporting Appellants based on the violations of due process suffered by Petitioners.

B. THE DHS SHOULD BE ESTOPPED FROM REMOVAL OF PETITIONERS.

Estoppel is appropriate only where the government committed affirmative misconduct and not merely false processing functions. *Santamaria-Ames v. INS*, 104 F.3d 1127 (9th Cir. 1996); *Cadwalder v. Andrus*, 45 F.3d 297 (9th Cir. 1995). Petitioners have been entangled within the bribery and fraud convictions of

a former INS agent. This entanglement resulted in the prosecution by the DHS of removal of Petitioners. The criminal misconduct by the agent of the Government resulted in Petitioners prosecution for removal.

Claims of estoppel against the government apply only when the government wrongful acts will cause serious injustice and the public's interest will not suffer undue damage by imposition of the liability. *Morgan v. Heckler,* 779 F.2d 544 (9th Cir. 1985), *Mukherjee v. INS*, 793 F.2d 1006 (9th Cir. 1986). Enforcement of deportation of Petitioners will result in serious injustice to Petitioners who have created successful lives in the United States based on their reliance of the issued immigration status. Similarly, the public's interest is served by allowing Petitioners to remain in the United States and not sever their relationships with this country that include business, education and societal ties. Estoppel is appropriate to prevent severe injustice to Petitioners. *U.S. v. Omdahl*, 104 F.3d 1143 (9th Cir. 1997); *Jaa v. INS*, 779 F.2d 569 (9th Cir. 1986). Petitioners will suffer severe injustice if they are forced to move to South Korea after spending more than fifteen years in the United States building a new and permanent life.

No evidence has been presented that shows that Petitioners were aware of the bribery and fraud committed by Sustaire. Estoppel of actions by the Government is appropriate where Petitioners were ignorant of the true criminal actions committed by the Government but relied on those actions as true. *S&M Inv. Co. v. Tahoe Regional Planning Agency*, 911 F.2d 324 (9th Cir. 1990). Petitioners relied on the issuance of the immigration papers and lived a productive life

in the United States at the cost of terminating their life in South Korea prompted by the issuance of their immigration papers in the United States. The Government should be estopped from shattering these stable lives and forcing Petitioners to leave this country and begin new lives in another country where they don't have long term ties.

CONCLUSION

For the reasons set forth above, Petitioners request that this Court assume jurisdiction over this case, and find that Petitioners' appeal should be granted and that the decision of the BIA and the Immigration Judge be overturned and deportation actions be terminated based on a defense claim of estoppel.

Respectfully submitted,

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